Supreme Court, U. S.
FILED
DEC 13 1974
MICHAEL RODAK, JR., CLERK

No. 74-744

# In the Supreme Court of the United States

OCTOBER TERM, 1974

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

SAMUEL SHAPIRO AND BELLA SHAPIRO

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

ROBERT H. BORK,
*Solicitor General,*
SCOTT P. CRAMPTON,
*Assistant Attorney General,*
STUART A. SMITH,
*Assistant to the Solicitor General,*
ERNEST J. BROWN
ROBERT S. WATKINS,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| Reasons for granting the writ | 9 |
| Conclusion | 16 |
| Appendix A | 1a |
| Appendix B | 3a |
| Appendix C | 18a |
| Appendix D | 20a |
| Appendix E | 22a |
| Cases: | |
| *Alexander* v. *"Americans United" Inc.*, No. 72–1371, decided May 15, 1974 | 9 |
| *Bob Jones University* v. *Simon*, No. 72–1470, decided May 15, 1974 | 9, 11, 12, 15 |
| *Cheatham* v. *United States*, 92 U.S. 85 | 10 |
| *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 | 9, 10, 11, 12, 13, 14, 15 |
| *Lucas* v. *Structural Steel Co.*, 281 U.S. 264 | 12 |
| *Lucia* v. *United States*, 474 F.2d 565 | 13 |
| *Pizzarello* v. *United States*, 408 F.2d 579 | 13 |
| *Shapiro, In re*, 352 F. Supp. 641, on review *sub nom. Shapiro* v. *Ferrandina*, 355 F. Supp. 563, affirmed, 478 F.2d 894 | 3 |
| *Snyder* v. *Marks*, 109 U.S. 189 | 10 |
| *State Railroad Tax Cases*, 92 U.S. 575 | 10 |
| *United States* v. *American Friends Service Committee*, No. 73–1791, decided October 29, 1974 | 9 |
| *Welch* v. *Helvering*, 290 U.S. 111 | 12 |
| *Wickwire* v. *Reinecke*, 275 U.S. 101 | 12 |

Statutes and rule:


| | Page |
|---|---|
| Act of March 2, 1867, c. 169, 14 Stat. 471, 475 Section 10 | 10, 15 |
| Internal Revenue Code of 1954 (26 U.S.C.) | |
| Sec. 6212 | 2 |
| Sec. 6212(a) | 3 |
| Sec. 6213 | 2 |
| Sec. 6331 | 2, 4 |
| Sec. 6861 | 2 |
| Sec. 6861(b) | 3 |
| Sec. 7421(a) | 2, 10, 12 |
| 28 U.S.C. 1346 | 15 |
| Rule 142 of the Rules of Practice of the Tax Court | 14–15 |


# In the Supreme Court of the United States

OCTOBER TERM, 1974

---

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

SAMUEL SHAPIRO AND BELLA SHAPIRO

---

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

The Solicitor General, on behalf of the Commissioner of Internal Revenue,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The order of the district court (Appendix A, *infra*, pp. 1A–2A) is not reported. The opinion of the court of appeals (Appendix B, *infra*, pp. 3A–17A) is reported at 499 F.2d 527.

---

[1] This case was styled *Samuel Shapiro and Bella Shapiro* v. *Secretary of State, et al.* in the courts below, because of the presence of a question relating to respondent's extradition. The extradition is no longer at issue in this case. Accordingly, the Commissioner of Internal Revenue is the only petitioner.

### JURISDICTION

The judgment of the court of appeals was entered on May 15, 1974 (Appendix C, *infra* pp. 18A–19A) and a petition for rehearing was denied on July 17, 1974 (Appendix D, *infra,* pp. 20A–21A). By order dated October 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

The Anti-Injunction Act (Section 7421(a) of the Internal Revenue Code of 1954) bars a suit in any court by any person to restrain the assessment or collection of any tax.

The question presented is whether the Commissioner of Internal Revenue is required to prove the facts upon which a tax assessment is based before the bar of the Anti-Injunction Act is applicable.

### STATUTES INVOLVED

Sections 6211, 6212, 6213, 6331, 6861, and 7421 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Appendix E, *infra,* pp. 22A–25A.

### STATEMENT

Respondent [2] is a citizen of the State of Israel who entered the United States in 1970. Sometime after his arrival in this country, respondent was indicted in Israel for securities fraud. The Israeli government sought his extradition and respondent litigated the

[2] References to "respondent" are to Samuel Shapiro. His wife, Bella Shapiro, is a party only because of her co-ownership of property subject to federal tax liens.



extradition request in the United States District Court for the Southern District of New York. The district court found him extraditable and the Second Circuit affirmed. *In re Shapiro,* 352 F. Supp. 641 (S.D. N.Y.), on review *sub nom. Shapiro* v. *Ferrandina,* 355 F. Supp. 563 (S.D. N.Y.), affirmed, 478 F. 2d 894. Respondent thereupon agreed to withdraw his petition for a writ of certiorari in the extradition proceeding (No. 72–1701), and to surrender voluntarily for extradition after receiving assurances from the Israeli government that he could be released on bail pending his trial on the securities fraud charges (Appendix B, *infra,* pp. 4A–5A).

The agreed extradition date was December 9, 1973. On December 6, 1973, the Commissioner of Internal Revenue made jeopardy assessments against respondent pursuant to Section 6861 of the Internal Revenue Code of 1954, aggregating $92,726.41, for nonpayment of federal income taxes for his taxable years 1970 and 1971. On the same date, the Internal Revenue Service filed tax liens upon respondent and served notices of levy upon various banks in the State of New York where respondent maintained accounts or had safe deposit boxes.

Respondent thereupon commenced this action in the United States District Court for the District of Columbia to require the Commissioner to lift the notices of levy [3] and to prohibit the government from ex-

[3] On October 11 and 15, 1973, the Internal Revenue Service served new notices of levy against respondent. Consequently, his property remains subject to the distraint procedures provided by Section 6331 of the Code.

ecuting the extradition warrant pending resolution of the tax dispute. Subsequently, on December 21, 1973, the Commissioner mailed a notice of deficiency to respondent, pursuant to Sections 6861(b) and 6212(a) of the Code. The notice stated that the 1970 assessment was based upon unexplained bank deposits by respondent of $18,000, and the 1971 assessment was based upon unreported income of $137,280 from respondent's activities as a dealer in narcotics (Appendix B, *infra*, pp. 5A–6A).

After a hearing, the district court dismissed respondent's suit for injunctive relief (Appendix A, *infra*, pp. 1A–2A). It held that it lacked jurisdiction to enjoin execution of the extradition warrant. It further concluded that the Anti-Injunction Act barred respondent's action to enjoin the assessment and collection of taxes because it could not find that (1) under no circumstances could the government prevail on the merits of its claim; and (2) that respondent was threatened with irreparable injury for which there was no adequate legal remedy since he could have sought a redetermination of the deficiency in the Tax Court (R. 186–191).[4]

On the same day (May 15, 1974) that this Court announced its decisions in *Bob Jones University* v. *Simon*, No. 72–1740, and *Alexander* v. *"Americans United" Inc.*, No. 72–1371, the court of appeals

[4] "R." references are to the record appendix filed in the court of appeals. On January 3, 1974, respondent filed a petition in the Tax Court for redetermination of the deficiencies set forth in the Commissioner's statutory notice. That suit is presently pending. *Shapiro* v. *Commissioner*, No. 178–74.



affirmed the district court's dismissal of respondent's suit to enjoin execution of the extradition warrant.[5] However, it reversed and remanded the case for an examination of the facts upon which the Commissioner based his tax assessment against respondent. In so remanding, the court of appeals stated that "[w]hile it is not probable that the Government created the deficiency out of whole cloth, it is equally true that "[the Government's] burden [to show good faith] is not met by mere 'protestations of good faith and conclusory statements of plaintiff's tax liability * * *' " (Appendix B, *infra*, pp. 16A.).

Subsequent to the decision by the court of appeals, the district court ordered the government to "file with the Court and serve on the Plaintiffs * * * the factual submission upon which the government seeks to rely as providing a factual foundation that Plaintiff Shapiro was a narcotics dealer and that the government's calculation of the deficiency has a rational basis, so that the Court can determine if the claim is 'entirely excessive, arbitrary, capricious, and without factual foundation' " (Order of October 29, 1974).

[5] Upon his appeal to the court of appeals, respondent filed in this Court an application for a continuation of the court of appeals' stay of the extradition order pending oral argument and decision by the court of appeals (No. A–788). On May 16, 1974, the day following the decision by the court of appeals, the Chief Justice dismissed the application as moot. Respondent was thereupon extradited to Israel and released on bond. His release was allegedly made possible because the Israeli government reduced the amount previously requested as security for his appearance, and a relative in Israel agreed to provide her apartment as partial security for his appearance. (See Appellants' Opposition to Motion to Stay Mandate filed in the Court of Appeals on July 30, 1974, p. 4.)

Pursuant to the district court's order, the government submitted an affidavit of the revenue agent who investigated respondent's income tax liabilities. The affidavit stated that the basis for the deficiencies determined by the Commissioner was as follows:

a. There was no record that Samuel Shapiro had filed an income tax return for 1970.

b. Samuel Shapiro had filed an income tax return for 1971 reporting no tax liability based upon $1,600 in adjusted gross income, consisting of $2,600 miscellaneous income from private tutoring, and net short-term losses from commodity transactions of $1,450 (limited to $1,000 in computing adjusted gross income).

c. Deposits were credited to two accounts in the name of Samuel Shapiro at the First National City Bank, New York, Nos: 04993564 and 05008773, of $18,000 in 1970 and $36,735 in 1971.

d. Early in 1972 Samuel Shapiro paid more than $3,000 in currency for the purchase of an automobile.

e. Information available to the Internal Revenue Service indicated that early in 1973 Samuel Shapiro paid more than $40,000 in cash for a home whose price was $60,000.

f. Information supplied to the Internal Revenue Service indicated that Samuel Shapiro had been smuggling into the United States substantial amounts of an illegal substance, hashish, every six days from Israel, presumably for resale within the United States, and also supported a conclusion that Samuel Shapiro was dealing in hashish, during 1971.



g. The 1971 bank deposits referred to in subparagraph (c) above included money transfers from an individual since convicted of selling hashish, who stated that the transfers were for hashish Samuel Shapiro supplied to him as follows:

| | |
|---|---|
| April 19, 1971 | $2,000 |
| April 23, 1971 | 2,300 |
| May 6, 1971 | 2,000 |
| May 11, 1971 | 1,500 |
| June 8, 1971 | 1,500 |
| August 18, 1971 | 5,600 |

h. Information available to the Internal Revenue Service indicated that the known practice in hashish trafficking was to deal in full kilos (kilograms), equal to 2.2 pounds; that during 1971 the retail price of hashish was $1,360 to $1,980 per pound, or $2,992 to $4,356 per kilo; and that the wholesale cost to a dealer would approximate $2,350 per kilo; and that the common practice in hashish dealing was to receive payment in two parts—the first for cost and the second for profit.

i. On the basis of the information set forth in subparagraphs (g) and (h) above, the revenue agent concluded that during 1971 Samuel Shapiro was dealing in at least 2 kilos of hashish per week, and that his taxable profit therefrom was $137,280, computed as follows:

| | |
|---|---|
| Selling price | $7,340 |
| Cost | −4,700 |
| Weekly profit | $2,640 |
| 1971 profit (52 weeks) | $137,280 |

j. The revenue agent also concluded that unexplained deposits of $18,000 during 1970 were taxable income.

(Affidavit of November 8, 1974, of Revenue Agent Richard A. Conde, pp. 2–4).

At a hearing held by the district court on November 12, 1974, counsel for respondent submitted two affidavits executed by respondent (which had been filed in the Tax Court) denying that he was or ever had been a dealer in narcotics. Respondent's affidavits further stated that his 1971 income tax return was correct. Counsel for respondent also submitted an affidavit of Rachel Laub, a resident of Switzerland, which stated that at respondent's request in 1970, she held for him in safekeeping $50,000 in cash and approximately 18–20 kilos of gold bars. That affidavit further stated that at respondent's request, she transmitted the cash to him in 1971, and the proceeds of the sale of the gold bars ($32,000 and $35,000) in 1971 and 1972, respectively (Affidavits of Samuel Shapiro and Rachel Laub, dated February 14, 1974 and December 11, 1973).

At the conclusion of the hearing on remand, the district court indicated that the revenue agent's affidavit was insufficient to invoke the bar of the Anti-Injunction Act. It stated to counsel for the government as follows: "I think I am going to have to have some more information. Otherwise, I don't think this affidavit is sufficient. Unless you are willing to submit the informant to examination by the court and the information upon which the affidavit was based by [the revenue agent], I am not fully satisfied, in all candor * * * I just don't feel that this affidavit is sufficient for the court to overcome what the Court of Appeals said the government had to do" (Tr. of Proceedings of November 12, 1974, pp. 71–72).[6]



On November 18, 1974, the government advised the district court that it had determined that it would not submit additional documentary evidence or testimony of confidential informants at this time for *in camera* examination or otherwise. No order has yet been issued by the district court.

## REASONS FOR GRANTING THE WRIT

In remanding this case for a hearing to determine the facts upon which the tax assessment was based, the court of appeals has held that the Commissioner of Internal Revenue is required to prove the correctness of a tax assessment before the bar of the Anti-Injunction Act is applicable. That decision conflicts with the rule established by this Court in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, which was reaffirmed only last Term in *Bob Jones University* v. *Simon*, No. 72–1470, and *Alexander* v. *"Americans United" Inc.*, No. 72–1371, both decided May 15, 1974. See also *United States* v. *American Friends Service Committee*, No. 73–1791, decided October 29, 1974. If permitted to stand, the decision below will severely disrupt the orderly collection of taxes by subjecting the Commissioner to injunctive actions which have been explicitly prohibited by Congress for more than 100 years. Since any taxpayer subject to a deficiency assessment can bring an injunctive suit

[6] The record transmitted by the court of appeals does not include any of the material with respect to the remand proceeding. We are accordingly lodging with the Clerk copies of the October 29, 1974 order of the district court, the affidavits filed by the parties, and the transcript of the hearing held by the district court on November 12, 1974.

against the Commissioner in the District of Columbia and gain the benefit of this decision, there is no likelihood that a conflict between the circuits will develop. This Court should review this issue in this case.

1. The federal Anti-Injunction Act, 26 U.S.C. 7421 (a), Appendix E. *infra*, p. 25A, provides with exceptions not applicable that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The statute was enacted in 1867[7] in order to prevent the same type of injunctive suits which had flooded the state taxation systems from similarly inundating the federal tax system. This Court soon thereafter recognized the soundness of the Congressional policy which underlay the Act, namely, that if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government itself would be threatened. See *State Railroad Tax Cases*, 92 U.S. 575, 613; *Cheatham* v. *United States*, 92 U.S. 85, 89; *Snyder* v. *Marks*, 109 U.S. 189, 193–194.

The statutory prohibition of injunctions against tax assessment or collection activities is subject to one narrowly limited exception this Court created. In *Enochs* v. *Williams Packing Co., supra*, 370 U.S. at 7, the Court unanimously held that a taxpayer could obtain an injunction only if he satisfied a two-fold test: first, he must show that "it is clear that under

[7] The statute originated as Section 10 of the Act on March 2, 1867, c. 169, 14 Stat. 471, 475, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.



no circumstances could the Government ultimately prevail" on the merits of it legally claim; secondly, he must show that "equity jurisdiction otherwise exists" for which there is no adequate legal remedy.

The Court recently reaffirmed the *Williams Packing* test in *Bob Jones University* v. *Simon, supra*, decided May 15, 1974. Noting that Williams Packing was the "capstone" of judicial construction of the Anti-Injunction Act and marked an end to cyclical departures from the Acts's plain meaning (slip op. at 16), the Court dismissed an injunctive action seeking to prohibit the Commissioner from withdrawing a private school's tax-exempt status. In *Bob Jones* tives to the Commissioner's action. The Court rejected such an argument as a basis for injunctive relief, declaring that "[t]here is no evidence that [the Commissioner's position] does not represent a good-faith effort to enforce the technical requirements of the tax laws, and * * * we cannot say that its position has no legal basis or is unrelated to the protection of the revenues. The Act is therefore applicable" (slip op. 14).

Although the court below invoked *Williams Packing* as authority for its remand to the district court, its requirement that the government must affirmatively show good faith in the making of its assessment is incompatible with the rule of that case. As the Court there observed, "the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid. *Snyder* v. *Marks*, 109 U.S. 189, 194" (370 U.S. at 8). Thus, *Williams Packing* adhered to the Court's longstanding decisions that a tax assessment is presumptively valid and that the

Internal Revenue, the taxpayer had attributed non-tax no-

burden is on the taxpayer to prove its invalidity. See, *e.g., Lucas* v. *Structural Steel Co.*, 281 U.S. 264, 271; *Wickwire* v. *Reinecke*, 275 U.S. 101, 105; *Welch* v. *Helvering*, 290 U.S. 111, 115.

Accordingly, in order to satisfy the first aspect of the *Williams Packing* test—that the government's claim of liability is without foundation—the taxpayer must come forward with the requisite proof that under no circumstances could the government prevail on the merits of its claim.. The court of appeals' conclusion (Appendix B, *infra*, pp. 16A) that "[the Government's] burden [to show good faith] is not met by mere 'protestations of good faith and conclusory statements of plaintiffs' tax liability' " cannot be squared with this Court's statement in *Williams Packing* that "[t]o require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act—protection of the collector from litigation pending a suit for refund" (370 U.S. at 7–8) and its holdings that a tax assessment is presumptively correct.[8]

2. In ruling that the bar of the Anti-Injunction

[8] The court below also erred in holding that respondent met the equitable irreparable injury component of the *Williams Packing* test (Appendix B, *infra*, p. 17A). It based this conclusion upon the fact that the tax levies froze funds respondent intended to use to post bond in Israel. But *Williams Packing* explicitly held that the bar of the Anti-Injunction Act may not be evaded "merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise" (370 U.S. at 6). Like *Bob Jones University*, this is not a case where respondent has no access to judicial review of the Commissioner's assessment. Indeed, he has commenced an action in the Tax Court for a redetermination of the deficiencies at issue.



Act is not applicable unless the government has proved the correctness of the assessment, the court below relied upon *Pizzarello* v. *United States*, 408 F. 2d 579 (C.A. 2); and *Lucia* v. *United States*, "474 F. 2d 565 (C.A. 5) (*en banc*). Whether or not those cases fully conform to this Court's *Williams Packing* decision, they do not hold that the government must prove the correctness of a tax assessment in order to defeat an action brought by the taxpayer to enjoin its assessment. In *Pizzarello*, the Second Circuit relied upon *Williams Packing* in reversing the denial of an injunction against a gambling excise tax assessment which was based upon a five-year projection of wagering activity. That case, however, is distinguishable. There, the taxpayer had been indicted for operating a gambling establishment for two months. Because of this obvious disparity in the time periods, the court found "no proof in the record * * * that Pizzarello operated as a gambler for five years or that, even if he did so operate, his three-day average * * * represented his average daily business for the other 1,575 days" (408 F. 2d at 583). In enjoining the assessment as excessive, the court noted that the Commissioner's determination that the taxpayer was engaged in gambling activity for five years was "unsupported either by the record or by affidavits" (*id.* at 584).

*Lucia* similarly involved a gambling excise tax assessment based upon a projection of wagering activity. There, the taxpayer argued on appeal that he could demonstrate the error of projection employed by the government. In remanding the case to the

district court for a factual determination of the taxpayer's allegation that the assessment was without foundation, the Fifth Circuit explicitly stated that "the taxpayer, Lucia, will have to prove his case upon remand, and the extent of our holding goes no further than to give him that opportunity" (footnote omitted) (474 F. 2d at 575). Thus, contrary to the decision below, *Lucia* squarely places the burden of meeting the first aspect of the *Williams Packing* test—that the assessment is without any foundation—upon the taxpayer. In that respect, it conflicts with rather than supports the decision of the court below.

3. The disruption to the orderly collection of taxes augured by the decision below has already been confirmed by events which have occurred in the remand proceeding. Pursuant to the district court's order, the government submitted a detailed affidavit of the revenue agent showing the basis for the assessment against respondent. Although this affidavit demonstrated that the assessment was made with regularity and in good faith and that it was not without foundation, the district court required that the government produce for judicial examination its confidential informant and the information upon which the assessment was based (Tr. 71–72).

By forcing the government to come forward in this injunctive action with affirmative proof to justify its assessment, the courts below have not only inverted the burden of proof but have also shifted the forum for the resolution of tax disputes from the Tax Court, where respondent has filed a petition and bears the burden of proof pursuant to Rule 142(a) of the



rules of that court,[9] to the district court. In so doing, they have contravened this Court's consistent recognition that the purpose of the Anti-Injunction Act is to protect the government's need to assess and collect taxes as expeditiously as possible "and to require that the legal right to the disputed funds be determined in a suit for refund [or in the other congressionally authorized forum, the Tax Court]."[10] *Enochs* v. *Williams Packing Co., supra,* 370 U.S. at 7. See also *Bob Jones University* v. *Simon, supra,* slip op. at 11, and cases cited therein.

The effect of the decision below will be to convert the litigation of jeopardy assessments into injunctive actions in which the Commissioner will be forced to prove the correctness of his assessment. Such a radical departure from the rule of *Williams Packing* and *Bob Jones University* by a court whose jurisdiction is open to all taxpayers calls for review by this Court.

---

[9] Rule 142(a) of the Rules of Practice and Procedure of the United States Tax Court states: "The burden of proof shall be upon the petitioner [the taxpayer], except as otherwise provided by statute, and except that, in respect of any new matter * * * pleaded in his answer, it shall be upon the respondent [the Commissioner]."

[10] Because *Williams Packing* involved employment (F.I.C.A. and F.U.T.A.) taxes over which the Tax Court has no jurisdiction, the opinion only referred to a refund suit. See 28 U.S.C. 1346.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*
SCOTT P. CRAMPTON,
*Assistant Attorney General.*
STUART A. SMITH,
*Assistant to the Solicitor General.*
ERNEST J. BROWN,
ROBERT S. WATKINS,
*Attorneys.*

DECEMBER 1974.

## APPENDIX A

United States District Court for the District of Columbia

Civil Action No. 2172–73

SAMUEL SHAPIRO AND BELLA SHAPIRO
*v.*
SECRETARY OF STATE, ET AL.

*Order*

Upon consideration by the Court of Plaintiffs' motion for a preliminary injunction, defendants' opposition thereto, defendants' motion to dismiss and plaintiffs' opposition thereto, the entire record herein and argument of counsel, and for the reasons set forth in the oral opinion of the Court rendered December 21, 1973, it is, by the Court this 21st day of December, 1973,

ORDERED and DECREED:

1. That the Court lacks jurisdiction over the cause; and

2. That plaintiffs have failed to meet the requirements for the issuance of a preliminary injunction as set forth in the case of *Virginia Petroleum Jobbers Ass'n.* v. *FPC,* 104 U.S. App. D.C. 106 (1958); and

3. That the Court in equity should not interfere with the execution of the extradition warrant issued by the Secretary of State relative to plaintiff Samuel Shapiro; and

4. That plaintiffs' motion for a preliminary injunction be, and the same hereby is denied; and

5. That plaintiffs' action be and the same hereby is dismissed; and

6. That the plaintiffs' application for a stay of the operation of this judgment is granted and the temporary restraining order of December 14, 1973 is extended to and including 6:00 p.m. Wednesday, December 26, 1973 by consent of the parties to enable plaintiffs to seek a stay in the U.S. Court of Appeals for the District of Columbia Circuit, in accordance with the arrangements made by the parties with the Clerk of the Court of Appeals on December 21, 1973.

Charles R. Richey,
CHARLES R. RICHEY,
*United States District Judge.*

# APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 73-2260

SAMUEL SHAPIRO, BELLA SHAPIRO, APPELLANTS

*v.*

SECRETARY OF STATE, ET AL.

Appeal from the United States District Court for the District of Columbia

Decided May 15, 1974

*Nathan Lewin,* with whom *Herbert J. Miller, Jr.* and *Martin D. Minsker* were on the brief, for appellants.

*Robert S. Watkins,* Attorney, Department of Justice, with whom *Scott P. Crampton,* Assistant Attorney General, *Earl J. Silbert,* United States Attorney and *Robert S. Rankin,* Assistant United States Attorney were on the brief, for appellees. *Arnold T. Aikens,* Assistant United States Attorney also entered an appearance for appellees.

Before: FAHY, *Senior Circuit Judge,* LEVENTHAL and ROBINSON, *Circuit Judges.*

PER CURIAM: Appellant Samuel Shapiro, a citizen of Israel, sought to enjoin his extradiction by the United States, or, in the alternative, to enjoin a jeopardy assessment made against him by the Commissioner of Internal Revenue. Holding that it lacked jurisdiction, the District Court denied a motion for preliminary injunction and dismissed the complaint. Because we believe that the District Judge acted pre-

naturely in dismissing the complaint against the Commissioner insofar as appellant sought to enjoin the jeopardy assessment, we remand the case for further proceedings in that regard.

## I. Background

Sometime after coming to this country during 1970, appellant was indicted in Israel for securities fraud. The Israeli government sought his extradition, and appellant litigated the extradition request in the Southern District of New York. The District Court there found him extraditable [1] and the Second Circuit affirmed.[2] Thereafter, appellant petitioned the Supreme Court for a writ of certiorari and also began negotiations with the Israeli government, in which the Department of State acted as intermediary. Appellant offered to forego further litigation, to withdraw his petition for certiorari, and to submit voluntarily to extradition; in return, he asked: (1) to remain in the United States until the birth of his child, expected in the fall of 1973; (2) to receive a speedy trial in Israel; and (3) to be free on bond before and during trial. After a dispute over the bail question Israel agreed to appellant's requests, and appellant withdrew his petition for certiorari.

Appellant's wife gave birth to a daughter on November 15, 1973, and appellant so notified the Department of State. The Secretary of State then signed a warrant of extradition and appellant agreed to surrender to the United States Marshal in New York on December 9, 1973, for immediate extradition. Appellant also

[1] *In re Shapiro*, 352 F. Supp. 641 (S.D.N.Y. 1973) (District Judge sitting as extradition magistrate). Thereafter, appellant sought a writ of habeas corpus and another District Judge reviewed the findings of the magistrate. *Shapiro* v. *Ferrandina*, 355 F. Supp. 563 (S.D.N.Y. 1973).

[2] *Shapiro* v. *Ferrandina*, 478 F. 2d 894 (2d Cir. 1973).



arranged to transfer to the New York branch of the Bank Leumi of Israel certain funds then on deposit in several New York banks. These funds were to be used as bond for appellant's freedom in Israel under his arrangement with the Israeli government. On December 6, 1973, however, one business day before appellant's extradition, the Internal Revenue Service (IRS) imposed a jeopardy assessment on appellant, and served "Notices of Levy" on the New York banks in which appellant maintained accounts or safe deposit boxes. Appellant claims these levies distrained the money which he planned to use as bond in Israel.

Following the IRS's actions, appellant received from Israel a one-week postponement of his extradition. During this week, he brought suit in the District Court for preliminary and permanent injunction against either extradition or the action of the IRS. In response, the Government moved to dismiss the complaint for failure to state a cause of action, and for lack of subject matter jurisdiction. Initially the District Court issued a temporary restraining order against the extradition, but did not restrain the levies on appellant's funds. After filing his complaint, appellant served interrogatories on the IRS, seeking information about the nature of the tax claim against him and the investigation underyling the claim. The IRS reluctantly responded to several of appellant's interrogatories,[3] but resisted others as irrelevant or premature.[4] In particular the IRS asserted that it could withhold all information about the nature of its claim against appellant for sixty days, *i.e.*, until required to serve a notice of deficiency. The IRS further contended that the District Court lacked jurisdiction to

[3] Shapiro had to compel response by motion to the District Court.

[4] Of nine interrogatories, the IRS answered only three.

investigate the claim underlying the jeopardy assessment, or, indeed, any aspect of the asserted tax liability. The IRS answered the interrogatories on December 19, 1973, and on December 20, 1973, the District Judge announced that he would render a decision at 3:00 p.m. the following day, December 21, 1973. On December 21, 1973, at 12:20 p.m., appellant's attorney received a supplement to the answers previously given by the IRS to the interrogatories. This supplement, containing the formal notice of deficiency that the IRS had previously withheld, revealed for the first time the basis of the assessment against appellant. The Commissioner asserted that appellant owed taxes for income derived from "activities as a dealer in narcotics. * * *"[5] Thereafter, at 3:00 p.m., the District Judge convened the previously announced hearing, stated from the bench that he lacked jurisdiction of the subject matter, and, accordingly, denied the motion for preliminary injunction and dismissed the complaint. Appellant appeals this decision.

## II. The Extradition

Although appellant sought to enjoin the IRS in the District Court, he asked, in the alternative, that the court enjoin his extradition. Because the Second Circuit has determined that appellant is extraditable, and because the Secretary of State has signed a valid warrant of extradition, the District Court properly concluded that it lacked jurisdiction to enjoin appellant's extradition. Subject to judicial determination of the applicability of the existing treaty obligation of the United States to the facts of a given case, extradition

[5] The allegations of narcotics dealing pertained to taxable year 1971. The notice also asserted a small deficiency based upon certain unexplained bank deposits made by appellant in 1970.



is ordinarily a matter within the exclusive purview of the Executive.[6] Accordingly, we affirm the trial judge's conclusion that the extradition should not be enjoined.[7]

## III. The Jeopardy Assessment

As to appellant's complaint to enjoin the jeopardy assessment made by the IRS, it appears that the dismissal of the action was premature. The District Court has limited jurisdiction to entertain a suit for injunction against the Commissioner, to whom we refer interchangeably with the IRS, and it is understandable, in the circumstances in which the problem was presented for decision, that the District Judge decided that Shapiro had not met the strict tests for that jurisdiction. On reflection, however, we think that Shapiro should have been indulged a greater opportunity to do so.

### A. *Statutory and Judicial Background*

Ordinarily, the Commissioner cannot attempt to collect an asserted tax deficiency until he has mailed a notice of deficiency to the taxpayer and the period during which the taxpayer may file suit in the Tax Court has expired.[8] And if the taxpayer files suit, the collection is further enjoined until the final decision of the Tax Court.[9] The single exception to this pro-

[6] *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

[7] Our order of February 14, 1974, suspending the effectiveness, as therein stated, of this court's denial of appellant's application for a stay, was not intended to affect appellant's extradition except as the Supreme Court might act with respect thereto.

[8] When the Commissioner determines that a taxpayer has failed to pay the correct tax in a previous year, he may issue a notice describing the alleged deficiency. Int. Rev. Code § 6212(a).

[9] Int. Rev. Code § 6213(a).

cedure comes when the commissioner "believes that the assessment or collection of a deficiency * * * will be jeopardized by delay * * *;" in that event "he shall * * * immediately assess such deficiency * * *, and notice and demand shall be made by the [Commissioner] for the payment thereof."[10] This is the jeopardy assessment procedure that the Commissioner used against Shapiro. Once the Commissioner has made a jeopardy assessment, he must notify the taxpayer and demand payment of the asserted deficiency. If the taxpayer neglects or refuses to pay within ten days after notice and demand, the Commissioner may collect the tax by seizing property of the taxpayer.[11] Moreover, "[i]f the Secretary [of the Treasury] or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section."[12]

---

[10] Int. Rev. Code § 6861(a). Once the Commissioner makes the jeopardy assessment, he has sixty days in which to mail a deficiency notice to the taxpayer. Int. Rev. Code § 6861(b).

[11] Int. Rev. Code § 6331(a). By levy is meant "the power of distraint and seizure by any means." Int. Rev. Code § 6331(b).

[12] Int. Rev. Code § 6331(a). It should be noted that section 6331(a) requires that the Commissioner provide a taxpayer prior notice of the demand for payment. The power to levy is inoperative until the subsequent "failure or refusal" of the taxpayer to pay the required amount. In the present case there are allegations that the Commissioner failed to provide the taxpayer the required notice prior to serving "Notices of Levy" on the taxpayer's New York banks. If so, then the Commissioner may well have violated Shapiro's right to due process. *See, e.g., Mrizek* v. *Long*, 187 F. Supp. 830, 835 (N.D.Ill. 1959):

"* * * if plaintiffs are being thus deprived of their property



A taxpayer against whom a jeopardy assessment is made must generally pay the asserted deficiency prior to litigation, and cannot obtain an injunction against the Commissioner from a district court.[13] There is, however, a single limited exception to this general rule. In *Enochs* v. *Williams Packing & Navigation Co.*,[14] the Supreme Court held that if equitable jurisdiction would otherwise exist—due to extraordinary circumstances causing irreparable harm to the taxpayer, for which the taxpayer has no adequate remedy at law—and if the taxpayer can show, on the basis of the facts available at the time of trial, that the Commissioner could not ultimately establish his claim, then a district court may issue an appropriate injunction.[15] This exception is quite narrow:

> Only if it is * * * apparent [at the time of trial] that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise the District

---

by administrative action purporting to conform, but failing to conform, to the requirements of Section 6331, the plaintiffs have sufficiently alleged deprivation of property without due process of law in violation of the Fifth Amendment."

If proven, this alleged failure by the IRS to adhere to the statute might well be sufficient basis for an injunction against the levies, assuming the presence of the other essentials of equitable jurisdiction. Certainly, such a failure would vitiate much of the good faith presumption accorded the IRS in these matters. *See* text, *infra*, at note 30. But absent an express finding of fact by the District Court, we are reluctant to lend dispositive weight to the untested allegations in appellant's brief.

[13] Int. Rev. Code § 7421(a).

[14] 370 U.S. 1 (1962).

[15] *See also Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932).

> Court is without jurisdiction and the complaint must be dismissed.[16]

The rationale of this judicially-created exception to the anti-injunction provision of the Internal Revenue Code is that district courts should be able to enjoin an asserted deficiency which is in fact an "exaction in the guise of a tax,"[17] if the exaction will cause the taxpayer irreparable harm.

When an asserted deficiency is an exaction rather than a tax, there can be no valid collection purpose which is stymied by the court's intervention.[18] Accordingly, the Commissioner can assert no interest that outweighs the taxpayer's interest in avoiding irreparable harm.[19]

B. *Application of the* Enochs *exception to the present case*

The principal focus of Shapiro's complaint is on facts that support a claim that his case contains the "special and extraordinary circumstances" that fulfill the equity half of the *Enochs* test for district court jurisdiction to enjoin a jeopardy assessment. As to the other half of the *Enochs* requirement, a showing that the IRS could not establish its claim, Shapiro's strongest argument to the District Court was that the actions of the IRS, when viewed in the whole context of pre-assessment events, constituted an illegal deprivation of his property without due process. In view of *Phillips* v. *Commissioner*,[20] the District Judge rejected the due process argument, and reluctantly granted the Government's motion to dismiss for lack of jurisdiction.

---

[16] *Enochs*, *supra*, 370 U.S. at 7.

[17] *Miller*, *supra*, 284 U.S. at 509.

[18] *Id.* at 509–10. *See also Dows* v. *Chicago*, 78 U.S. (11 Wall.) 108 (1870).

[19] *Miller*, *supra*, 284 U.S. at 510.

[20] 283 U.S. 589 (1931).



1. The District Judge correctly rejected Shapiro's due process argument with respect to the jeopardy assessment. But see footnote 12 as to the levy. In *Phillips*, the Supreme Court held that summary tax collection procedures are not violative of due process because the taxpayer has an opportunity for a subsequent hearing:

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. * * * Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.
>
> * * * * *
>
> The procedure provided in [the Code] satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee. (Citations omitted.)[21]

Appellant's attempt to avoid *Phillips* is unavailing. Although he is to be extradited for trial in Israel, it is unclear at this time that Shapiro will be unable to utilize his right to the subsequent judicial review that Justice Brandeis found in *Phillips* a sufficient protection for a taxpayer's right to due process. Of course, if the Tax Court should deny appellant a continuance until he can return to this country, or if the Immigration and Naturalization Service should refuse to allow appellant to re-enter the United States to litigate in the Tax Court, then the question of deprivation of due process may arise. But these events may never transpire, and unless and until they do we are not called upon to rule whether the procedures followed by the IRS fall outside the ambit of the

---

[21] *Id.* at 596–97.

Supreme Court's holding in *Phillips,* as recently reaffirmed in *Fuentes* v. *Shevin.*[22]

2. Notwithstanding the obstacle to relief posed by *Phillips,* there is another theory that might validate Shapiro's contention that the Commissioner will be unable to establish his claim for a deficiency. Case law in other circuits has established conclusively that the IRS cannot prevail when its asserted claim is "entirely excessive, arbitrary, capricious, and without factual foundation. * * *" *Lucia* v. *United States,* 474 F. 2d 565, 573 (5th Cir. 1973) (*en banc*); *Pizzarello* v. *United States,* 408 F. 2d 579 (2d Cir. 1969). Thus, if Shapiro can show, or if the trial court can determine from factual submissions of the Commissioner, that there is no factual foundation for the allegation that Shapiro was a narcotics dealer, or that the Government's calculation of the deficiency has no rational basis, then the District Court could find that the Government could not ultimately establish its claim.

3. Because he filed his complaint prior to the IRS's revelation of the basis and amount of its claim against him, Shapiro could not deny in his complaint that he was a narcotics dealer nor did he allege that the IRS's claim was invalid because it was arbitrary and excessive. But in the circumstances, such allegations are fairly implicit in the complaint and, broadly construed, the complaint should have been sufficient to withstand the Government's motion to dismiss.[23] Certainly the record contained no facts that would support any conclusion inconsistent with this view of the case.[24] Accordingly, the District Judge might have allowed Shapiro an opportunity to discover more evidence, or he could have compelled the Commissioner to provide factual support for the asserted deficiency. Alternatively, if the District Judge found the original complaint insufficient, he could have allowed Shapiro to amend it after the Commissioner's eleventh hour promulgation of the notice of deficiency.[25] But the District Judge we think should not have dismissed the complaint on the bare record before him.

[22] 407 U.S. 67, 92 n. 24 (1972).

[23] As one judge has ruled in similar circumstances,

"On a motion to dismiss, [the *Enochs* test for jurisdiction] is applied only after the factual allegations of the complaint have been construed in a manner most favorable to the pleader. Under 'the most liberal view of the law and facts' as deemed established by the pleadings, we are unable to say that the plaintiff has not met 'the requirement of showing that the United States cannot under any circumstances prevail." [Citations omitted.]

*Monsky* v. *Fitzgerald,* 297 F. Supp. 943, 946 (E.D.N.Y. 1968).



4. An effort by the District Court to discover the factual foundation for the IRS's claim against a taxpayer is consistent with *Enochs.* Indeed, both *Lucia* and *Pizzarello* underscore the Supreme Court's ruling in *Enochs,*

> that the question of whether the Government has a chance of ultimately prevailing is to be determined *on the basis of the information available to it at the time of suit.* [Emphasis added.][26]

As to the extent of the necessary inquiry into the facts, *Lucia* and *Pizzarello* also provide some guidance to the District Judge. For instance, in both cases two central facts had already been established on the

[24] Indeed, it is settled that "[f]or the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted." *Jenkins* v. *McKeithen,* 395 U.S. 411, 421 (1969), *citing Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172, 174–175 (1965).

[25] *See* Fed. R. Civ. P. 15; *Bonanno* v. *Thomas,* 309 F. 2d 320, 322 (9th Cir. 1962).

[26] 370 U.S. at 7.

public record before the cases came to the District Court: both courts knew (1) that the taxpayer had owned an illegal gambling establishment, and (2) the method by which the IRS had calculated the asserted deficiency.[27] Even with this information available to it, the Fifth Circuit in *Lucia,* sitting *en banc,* ruled unanimously that a fuller record was necessary for a proper determination whether the asserted deficiency was arbitrary and excessive. Accordingly, the court remanded the record to the District Court for further development:

> Was the taxpayer accepting wagers during the entire period covered by the assessment? Are the Government's figures based on realistic projections or were they merely derived Mandrake-like, from a filament of evidence and subjected to a sleight-of-hand computation? Does the 40% factor used in the computation have any factual basis, or is it merely the product of an agent's conjecture? Can the base day properly be assumed to be an average day for that week, much less for several years? Only after exploring all relevant considerations on remand will the District Court be able to determine whether the computative basis is so insufficient as to make the assessment an exaction in "the guise of a tax" rather than a legitimate tax on wagers.[28]

[27] In view of the holdings of the Second and Fifth Circuits that the IRS cannot prevail when its asserted deficiency was arbitrary and plainly excessive, we do not think *Lucia* and *Pizzarello* can fairly be confined to situations where it happens that the court had access to the facts and theory of the Government as developed in a prior criminal trial. The theory of Judge Weinstein in *Monsky* requires the Government to come forward in order to counter the complaint with a claim of lack of jurisdiction. And we note that *Lucia* was not based solely on the facts already known, for the appellate court remanded for further discovery.

[28] 474 F. 2d at 575.



On the other hand, in *Pizzarello* the Second Circuit acted without a remand. Where the Commissioner had asserted a large tax deficiency for several years of gambling income, but had determined this deficiency from only three days' gambling receipts, the court ruled that the Government's claim was excessive:

> * * * [T]here is no proof in the record before us that Pizzarello operated as a gambler for five years or that, even if he did so operate, his three-day average of April 12th–14th, 1962, represented his average daily business of the other 1,575 days. No court could properly make such inferences without some foundation of fact.
>
> * * * * *
>
> * * * the indictment charged Pizzarello with operating a bookmaking establishment only from March 30, 1965, to April 15, 1965. Where the Government got the date that Pizzarello was accepting wagers from April 1, 1960, is unsupported either by the record or by affidavits. Moreover, while we recognize the difficulties faced by Treasury Agents, and the need to estimate in situations of this nature, wagers received on three consecutive days can hardly be said to be representative of wagers received over a five-year period, even assuming Pizzarello accepted wagers for as long as the Government contends.
>
> * * * * *
>
> Because the District Director made a totally excessive assessment, excessive because based on entirely inadequate information, collection should be enjoined, if equity jurisdiction otherwise exists. [Footnotes omitted.][29]

[29] 408 F. 2d at 583–84. The Court in *Pizzarello* also held, in the alternative, that the IRS could not establish its claim because it had acted on the basis of illegally seized evidence. *Id.* at 585.

5. By its instant ruling, this court does not require the District Court to explore the matter in precisely the same manner as the District Court was instructed to do in *Lucia*, or as the Second Circuit did in *Pizzarello*. Every case is different and should be considered on its particular facts. But at the very least the District Court must obtain some evidence by which to judge whether the asserted deficiency was a tax or was so arbitrary and excessive as to be "an exaction in the guise of a tax." While it is not probable that the Government created the deficiency out of whole cloth, it is equally true that "[the Government's] burden [to show good faith] is not met by mere 'protestations of good faith and conclusory statements of plaintiff's tax liability. [Citation omitted.]' "[20] The District Court should therefore inquire whether there are any facts from which good faith may be inferred, and absent such facts, the judge should not dismiss the case in deference to any presumption in favor of the IRS.

## IV. Disposition

We therefore vacate the judgment dismissing the complaint for lack of jurisdiction, and remand the case to allow the District Court an opportunity to develop a record that adequately supports a ruling on the Government's motion to dismiss. On remand the District Judge should examine the facts on which the Government bases its claim against Shapiro and determine its jurisdiction on the basis of these facts, in light of *Lucia* and *Pizzarello*. On remand, the judge may wish to reconsider his denial of preliminary injunction. If not, then the jeopardy assessments will stand while the record is developed.

[20] *Monsky*, *supra*, 297 F. Supp. at 944. *See also United States* v. *DiCalese*, 32 Am. Fed. Tax R. 2d 73-5629 (E.D. Pa. 1973).



Because the case is somewhat sensitive in nature, it may be that the District Judge will wish to examine some of the Commissioner's information *in camera*. As we do not wish to force the Government to reveal on the public record such information as the names of informers, an *in camera examination* may be appropriate. This matter is within the discretion of the trial judge.

In remanding, it should be clear that we are satisfied that appellant's situation meets the equitable irreparable injury component of the *Enochs* test. Appelant alleges and the Commissioner does not dispute that the jeopardy assessment and the levies have frozen the funds he intended to use as bond in Israel. It therefore appears that after extradition Shapiro will be incarcerated, an incarceration that will cause irreparable injury for which he has no remedy at law. To be sure, Shapiro has a remedy at law against the levy on his funds. But while he can pursue his remedy against the levies either during or after his probable incarceration, a mere restoration of his funds will not repair the injury caused by his imprisonment. *Thus*, if the District Judge finds that there is no factual foundation for the Commissioner's actions, or that the amount of the asserted deficiency is totally excessive then he may enjoin the jeopardy assessment and the levy.

***Affirmed as to dismissal of the Complaint insofar as it relates to execution of the extradition warrant, otherwise reversed and remanded for further proceeding consistent with this opinion.***

## APPENDIX C

[United States Court of Appeals for the District of Columbia Circuit, Filed: May 15, 1974, Hugh E. Kline, Clerk]

United States Court of Appeals for the District of Columbia Circuit

No. 73-2260

September Term, 1973

Civil 2172-73

SAMUEL SHAPIRO, BELLA SHAPIRO, APPELLANTS

*v.*

SECRETARY OF STATE, ET AL.

Appeal From the United States District Court for the District of Columbia

Before: FAHY, Senior Circuit Judge, LEVENTHAL and ROBINSON, Circuit Judges

*Judgment*

This cause came on to be heard on the record on appeal from the United States District Court of the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed as to dismissal of the Complaint insofar as it relates to execution of the extradition warrant, otherwise re-





versed and remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

*Per Curiam.*

For the Court

Hugh E. Kline

HUGH E. KLINE,

*Clerk.*

Date: May 15, 1974

Opinion Per Curiam

## APPENDIX D

[United States Court of Appeals for the District of Columbia Circuit, Filed: July 17, 1974, Hugh E. Kline, Clerk]

United States Court of Appeals for the District of Columbia Circuit

No. 73-2260

September Term, 1973

Civil Action 2172-73

SAMUEL SHAPIRO, BELLA SHAPIRO, APPELLANTS

*v.*

SECRETARY OF STATE, ET AL.

Before: FAHY, Senior Circuit Judge, LEVENTHAL and ROBINSON, Circuit Judges

*Order*

The Commissioner of Internal Revenue, one of the appellees herein, has filed a petition for rehearing.

The court has given consideration to *Bob Jones University* v. *Simon,* 42 L. W. 4721, decided on May 15, 1974, the same day our opinion issued, and observes that it reaffirms *Enochs* v. *William Packing and Navigation,* 370 U.S. 1 (1962), which this court sought to apply, including the requirement both of extraordinary and exceptional circumstances, and of a showing that the action of the Internal Revenue





Service is plainly without a legal basis, before any injunctive relief may be granted. We see no reason to modify our mandate.

Accordingly, it is

ORDERED by the Court that appellees' petition for rehearing is denied.

*Per Curiam*

## APPENDIX E

**Internal Revenue Code of 1954 (26 U.S.C.):**

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) [as amended by Sec. 101(f), Tax Reform Act of 1969, *supra*] In General.—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) a a deficiency, over—

(2) the amount of rebate, as defined in subsection (b)(2), made.

* * * * *

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, and Sec. 101(j)(40), Tax Reform Act of 1969, *supra*] In General.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B of chapter 42, he is authorized to send notice





of such deficiency to the taxpayer by certified mail or registered mail.

* * * * *

SEC. 6213 RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, *supra*] Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90- day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

§ 6331. Levy and distraint.

(a) Authority of Secretary or delegate.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon

all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.

The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible). * * *

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) Authority for Making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a) immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.



(b) Deficiency Letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

* * * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *